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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

EXXON CORPORATION,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

SUPPLEMENTAL MEMORANDUM FOR EXXON CORPORATION REGARDING A NEW DECISION WHICH SHARPLY DIVIDES THE CIRCUIT COURTS AND REPLYING TO FEDERAL TRADE COMMISSION'S SUPPLEMENTAL MEMORANDUM

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A sharp conflict in the circuit courts has been created by a recent decision by the Tenth Circuit in *Mono-Therm Industries, Inc.* v. *FTC*, No. 80-2113 (10th Cir. July 14, 1981),[1] which came to Petitioner's attention subsequent to the filing of its last brief.[2] The Tenth Circuit

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[1] This decision is reproduced in a separate appendix.

[2] The government's decision to remain silent on *Mono-Therm*, which was available to it 20 days before it filed its Supplemental Memorandum, should be considered in connection with any effort by the government to file additional briefs on this matter.

has now adopted a position on standing and mootness as to appeals from Federal Trade Commission ("FTC") rules which cannot be reconciled with the Ninth Circuit's decision here. In *Mono-Therm*, the Tenth Circuit adopted a liberal interpretation of standing and mootness in direct appeals from FTC trade regulation rules, along with a strict cut-off on all appeals outside the statutory sixty-day time limit applicable to such rules. By contrast, the Ninth Circuit here adopted a rigid interpretation of standing and mootness in direct appeals along with an open-ended interpretation of the sixty-day statutory limit on appeals. This brief also responds to the government's supplemental brief regarding this Court's recent decision in *Federated Department Stores, Inc.* v. *Moitie*, No. 79-5017 (June 15, 1981). *Mono-Therm*, together with *Federated Department Stores*, creates a pressing need for the Court to grant certiorari and/or to summarily reverse the Ninth Circuit's ruling in this case.

1. Mono-Therm Industries, Inc. ("Mono-Therm") sought to challenge the validity of the FTC's "Labeling and Advertising of Home Insulation Rule" ("the R-Value Rule"), 16 C.F.R. § 460 (1980), which, like the Franchise Rule, was promulgated by the FTC under Section 18 of the Federal Trade Commission Act, 15 U.S.C. § 57a (1976 & Supp. III 1979). The R-Value Rule was promulgated on August 31, 1979; the FTC announced the effective date of the R-Value Rule on August 15, 1980; and the Rule became effective on September 29, 1980.

The FTC assured Mono-Therm "throughout the rulemaking proceeding and thereafter, that [the R-Value] Rule would not go into effect before the GSA adopted [definitions of R-Value which were crucial to understanding the R-Value Rule]." (Appendix at 6a.) During Mono-Therm's year-long delay in appealing the

R-Value Rule, the FTC also "assured [Mono-Therm that] . . . parity would be achieved" among home insulation manufacturers in the definitions. (*Id.* at 8a.) If Mono-Therm had filed an appeal during this period, presumably the FTC would have claimed, as it has here, that no case or controversy existed. The promised definitions "did not materialize" until "about a year later." (*Id.* at 6a.) When petitioner Mono-Therm belatedly found out that it had been placed "at a competitive disadvantage" by the R-Value Rule (*id.* at 7a), it filed an appeal from the Rule to the Tenth Circuit Court of Appeals after the statutory sixty-day period had expired (*id.* at 10a).

Discounting the fact that the FTC had misled Mono-Therm, and citing the requirement that a petition for judicial review of the validity of an FTC rule must be filed within sixty days after the rule's promulgation, 15 U.S.C. § 15a(e)(1)(A), the Tenth Circuit dismissed the action as untimely, stating:

> *Whatever the adequacy of amicable understandings with the FTC, they represent a remedy "truly independent" of time-circumscribed judicial review.* In sum, Mono-Therm's September 26, 1980 review petition, filed more than a year after the R-Value Rule was promulgated, *does not vest this court with jurisdiction to consider its claims.*

Appendix at 10a; emphasis added.

The Tenth Circuit's jurisdictionally-based holding in the *Mono-Therm* case is in direct conflict with the Ninth Circuit's assurance in this case that Petitioner can litigate anew the validity of the Franchise Rule if a later controversy arises concerning franchises which do not involve service stations. Contrary to the Ninth Circuit's holding here that Petitioner can renew its appeal when a controversy arises, in *Mono-Therm* the appellant was not permitted review of the validity of an FTC rule out-

side the sixty-day period even though the FTC had repeatedly assured Mono-Therm that there was no case or controversy within that statutory period. *Sub silentio*, the Tenth Circuit took a different view of the prerequisites for standing than the Ninth Circuit,[a] suggesting that a case or controversy existed during the sixty-day period even though Mono-Therm was uncertain as to the applicability of the R-Value Rule. (*Id.* at 8a.) The *Mono-Therm* holding, whether correct or not, is diametrically opposite from the Ninth Circuit's ruling.

2. In its supplemental brief, the government urges that this Court's decision in *Federated Department Stores, Inc.* v. *Moitie, supra*, is not in conflict with the Ninth Circuit's application of "simple justice" authorizing a future reinstatement of Petitioner's appeal here. Quite the contrary, that case confirms Petitioner's belief that the Ninth Circuit may not have jurisdiction to hear an appeal challenging the validity of the Franchise Rule outside the sixty-day statutory appeal period. The government's attempt to distinguish *Federated Stores* on the ground that it involved a dismissal on the merits ignores the fact that the likelihood of Petitioner obtaining pre-enforcement review of the merits of the Franchise Rule will be *de minimis* if this appeal is dismissed. *Cf. Mono-Therm Industries, Inc.* v. *FTC, supra.*

The government's suggestion that Petitioner may seek review of the validity of the Franchise Rule in an enforcement proceeding likewise ignores the fact that no company would knowingly subject itself to the risk of an enforcement proceeding carrying potential sanctions totalling $10,000 per day per violation solely to obtain review

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[a] The Tenth Circuit commented that there would have been a case and controversy by reason of the Rule's unclear application to *Mono-Therm*: "[I]f this [the R-Value Rule's lack of specificity] was unfair, or even simply too vague, [the Rule] was subject to challenge in August 1979." (*Id.* at 8a.)

of an illegal rule. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). Moreover, the government's position on the reviewability of the validity of the Rule in an enforcement proceeding in this case is inconsistent with the positions it is simultaneously advocating in pending enforcement proceedings brought under the Franchise Rule. In *FTC* v. *Marketing Associates, Inc., et al.* (D. Colo. filed July 7, 1981), for example, the government has taken the position that a violation of the Franchise Rule constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[4] *See also FTC* v. *H. N. Singer, Inc.*, Civ. No. 80-3068 (N.D. Cal. March 24, 1981). Similarly, the government's position in *Mono-Therm* as to the availability of review of the validity of a rule after the sixty-day statutory period has run is inconsistent with the government's position on reviewability in this litigation. In *Mono-Therm*, the government stated that once the sixty-day review period has run, a party "may no longer obtain judicial review of the Rule." Respondent's Reply Memorandum in Support of Motion to Dismiss For Want of Jurisdiction at 9, filed July 14, 1981; *FTC* v. *Marketing Associates, Inc., supra.*

The FTC's conduct here represents an unusual and extraordinary effort to evade judicial review of the validity of an FTC trade regulation rule. The failure of this Court to review the Ninth Circuit's dismissal of this litigation or to remand the case to the Ninth Circuit would sanction the FTC's efforts to evade judicial review and would permit it to exceed its powers unchecked by court review.

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[4] In that case, the FTC also represented that the Franchise Rule is "similar to securities laws" enacted by Congress several decades ago. (Memorandum In Support of Plaintiff's Motion for Preliminary Injunction at 6.) The Franchise Rule, if left unreviewed, will affect a major change on a significant segment of our economy.

CONCLUSION

The petition for a writ of certiorari should be granted to resolve the conflict between the Ninth and Tenth Circuits. In the alternative, a summary remand to the Court of Appeals for the Ninth Circuit for further consideration should issue in light of this Court's contrary decision in *Federated Department Stores, Inc.* v. *Moitie*, *supra*.

Respectfully submitted,

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